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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965 No. 1239

UNITED BISCUIT COMPANY OF AMERICA,
Petitioner,

v.

W. WILLARD WIRTZ and JOSEPH CAMPBELL,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PRESS OF ALLEN, LANE & SCOTT, PHILADELPHIA

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CITATIONS

CASES:

Endicott Johnson Corp. v. Perkins, 317 U.S. 501 . . 8,13,15

Funsten Co., 13 Wage & Hour Cas. 242 (per Hearing Examiner 1957), aff'd, 13 Wage & Hour Cas. 819 (per Administrator 1958) 15

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STATUTE:

Walsh-Healey Public Contracts Act, § 1, 49 Stat. 2036, 41 U.S.C. § 35 (1964) 3,4

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on November 19, 1965.

CITATIONS TO OPINIONS BELOW

The findings of fact and conclusions of law of the district court (J.A. 250-54)* are unreported and are printed in Appendix B to this petition at page 39. The opinion of the court of appeals is unreported and is printed in Appendix B to this petition at page 26.

* References to "J.A." are to the Joint Appendix in the court of appeals which has been certified to this Court as the record below and ten copies of which have been filed in this Court.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 1965. A timely motion for rehearing or in the alternative for rehearing *en banc* was denied on January 20, 1966, one judge of the court *en banc* being of the opinion that rehearing should have been granted. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Whether the Walsh-Healey Public Contracts Act, which is applicable to contracts with the Government for the furnishing of supplies in excess of $10,000, applies to a number of separate purchases of cookies and crackers by Government commissary operators for retail sales to customers in the manner of private grocery stores, where no single purchase equaled or exceeded $10,000 and where the Government had no obligation to make any purchase.

2. Whether the Walsh-Healey Act applies to a so-called "Purchase Notice Agreement," drafted by the Government, which provides that the Government need not make any purchase and that only when a purchase is made shall such transaction constitute a "valid and binding contract," and where every purchase made pursuant to such arrangement was less than $10,000 in amount.

3. Whether the Walsh-Healey Act, applicable only to those who "are fairly forewarned," applies to a private corporation selling cookies and crackers in separate transactions to Government commissaries where the Government not only did not forewarn such corporation but affirmatively informed it to the contrary.

STATUTE INVOLVED

The case turns upon the construction of the Walsh-Healey Public Contracts Act, 49 Stat. 2036, as amended, 41 U.S.C. §§ 35-45, printed in Appendix A to this petition at pages 17-25, the most relevant portion of which reads as follows:

> "§ 35. Contracts for materials, etc., exceeding $10,000; representations and stipulations
>
> *In any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States,* or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all the foregoing being hereinafter designated as agencies of the United States), *for the* manufacture or *furnishing of* materials, *supplies,* articles, and equipment *in any amount exceeding $10,000, there shall be included the following representations and stipulations* . . . [here follow certain requirements with respect to maximum employment hours and, by reference, payment for overtime.] (Emphasis added.)

STATEMENT OF THE CASE

Petitioner is a manufacturer of cookies and crackers for retail sale and sells and distributes its products to individual grocery store units through orders taken by its salesmen and truck deliveries made by its drivers. The sale and delivery of its products, in similar fashion, to individual government commissaries are in question here.

In May, 1957, petitioner offered to do business under a letter, referred to by the Government as a "Purchase Notice Agreement" (hereinafter referred to as "Purchase Notice"), directed to the Military Subsistence Supply Agency. This "offer" had actually been drafted by the Government (J.A. 84), although it was in the form of

a letter from petitioner to the Agency. It provided that petitioner would make available to the Government from a list of its products, at stated prices which were equal to or less than prices offered to all others, such of petitioner's goods as the Government *might* choose to purchase for resale, and that the Government would distribute copies of the list of goods to the operators of its purchasing facilities and would make its purchases, if any, directly from petitioner and not through middlemen.

The Purchase Notice also provided that the

> "*forwarding to* SUPPLIER [petitioner] *of each order shall constitute a valid and binding contract* . . . . It is understood that the GOVERNMENT is not obligated to purchase any of the items listed in this Offer" (J.A. 17). (Emphasis in the original typewritten Purchase Notice as prepared by the Government.)

The Purchase Notice also specified that failure to "place an order under the Purchase Notice Agreement will not be a breach of the agreement . . . ." (J.A. 16).

Before executing the Purchase Notice, petitioner's General Counsel reviewed the text drafted by the Government, noting that the Purchase Notice not only described itself as a continuing "Offer" but also provided that each order would constitute a "valid and binding contract" (J.A. 108-10). He therefore concluded that the Purchase Notice would not be subject to the Walsh-Healey Public Contracts Act, 49 Stat. 2036, as amended, 41 U.S.C. §§ 35-45 ("the Act"), the relevant portion of which imposes certain labor standards upon private persons who are parties to a "contract . . . for the . . . furnishing of . . . supplies . . . in any amount exceeding $10,000 . . . ." 41 U.S.C. § 35. Experience under this Purchase Notice, as well as previous Purchase Notice Agreements, demonstrated that the Government did not consider them subject to the Act, and this was confirmed by the fact that the Government never sent and petitioner never received any

of the various posters or notifications required to be sent to those persons or corporations which were subject to the Act (J.A. 110, 115, 141a).

In a letter dated in 1950 and introduced as petitioner's Exhibit 12 in the district court (J.A. 144-45), the Government had stated to another company with regard to the same form of Purchase Notice Agreement for bakery goods that *the Act did not apply* to such offers, although individual purchase orders "since they constitute an acceptance of the continuing offer signed by a manufacturer, would be subject to the [Act] if they are individually in excess of $10,000" (J.A. 144).[1]

The purchases here involved were products for retail sale to the customers of commissaries which the Government operates for the convenience of military households. No purchase from petitioner equaled or exceeded $10,000, the minimum required for the application of the Act, although the total orders placed pursuant to the Purchase Notice were substantially in excess of $10,000.

In October, 1959, more than two years after the execution of the Purchase Notice, petitioner received a mimeographed letter headed "Notice to the Trade" informing petitioner and others that the Department of Labor had "*recently advised* the Department of the Army that it considers the Walsh-Healey Act to be applicable to the Purchase Notice Agreement itself" (J.A. 145-46). (Emphasis added.)

Three months later the Department of Labor charged petitioner with a violation of the Act concerning its method of computing overtime, which was in conformity with and required by the collective bargaining agreement between petitioner and the union representing its drivers, although the wages actually paid under the collective bargaining agreement were in excess of the wages which the

[1] In 1943, a similar letter was written to a third company, National Biscuit Company. Appendix B, p. 38.

Government might compel under the minimum standards set by the Act (J.A. 98-99). The Department's enforcement proceedings directly involved only a relatively small segment of petitioner's operations centered in the Norfolk, Virginia, area, but the final decision in these proceedings will determine not only the amounts payable by petitioner in its nationwide operations but also amounts payable by, inter alia, other companies in the baking industry, one of which has formally stipulated to be bound by the result.[2]

The Department of Labor found petitioner in violation of the Act and ordered that additional amounts computed under the Act be paid as damages. Petitioner brought this action in the district court to obtain judicial review of that determination and, after remand to the Department, the determination was upheld by the district court. The court of appeals commented that the result was "somewhat harsh" (Appendix B, p. 38), but nonetheless affirmed it and denied rehearing.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari because the court below, in an effort to implement what it construed to be the legislative purpose of the Walsh-Healey Act, has misinterpreted that Act in a manner which is violative of the language of the Act and its legislative history, and this misinterpretation will have broad and far-reaching impact on many private persons that do business with the Government. More specifically, the Department of Labor and the courts below, by their decisions here, have expanded the word "contract", as used in the Act, to include all business relationships with the Government, whatever their form and substance, in direct conflict with the words of the statute and decisions of this Court.

[2] National Biscuit Company, Department of Labor, Division of Public Contracts, case No. PC-865 (July 11, 1963).

1. The decision of the court of appeals conflicts with the statute itself and with the principle announced in the leading decision of this Court defining the scope of the Walsh-Healey Act.

As set forth above, the Walsh-Healey Act applies to a "contract . . . for the . . . furnishing of . . . supplies . . . in any amount exceeding $10,000 . . . ."

Yet the document at issue, the Purchase Notice, was by its own terms, as prepared by the Government, only an "offer" to do business. Moreover, the very document expressly declared that "each order shall constitute a valid and binding contract . . .", and it is conceded that no such order equalled or exceeded $10,000.

These are the basic facts. Yet the Department of Labor and the courts below reached the conclusion that the offer, under which the Government had absolutely no obligation other than to distribute petitioner's price lists of products available for sale, constituted (1) a contract (2) for the furnishing of supplies (3) in an amount exceeding $10,000. They reached this conclusion in the face of the following:

a. Under the subject Purchase Notice there was no obligation on the Government to buy a single box of cookies from petitioner.

b. The Government expressly provided that *each order* (not the Purchase Notice) should constitute a contract.

c. The Government had previously taken the position that similar agreements were *not* subject to the Walsh-Healey Act.

d. The Government failed to notify petitioner that the Act applied, which it was required to do if such were the case.

e. For over two years the Government tacitly conceded the non-applicability of the Act.

This Court has authoritatively construed the Walsh-Healey Act, particularly as to the scope of its coverage, and that construction emphasizes the error of the court below.

In *Endicott Johnson Corp. v. Perkins,* 317 U.S. 501, 507, this Court held that the Walsh-Healey Act "is not an Act of general applicability to industry."

The court of appeals in the instant case, however, appears to have acted upon the contrary assumption that the coverage of the Act was to be extended to all Government purchases which on any theory could be considered significant, even if the method of purchase did not fit within the contract concept of the Act itself. The court of appeals stated:

> "We must thus start with the presumption that Congress intended the Act to cover all regular and institutionalized methods of purchase used by the Government resulting in large scale acquisitions of material and supplies from the private sector of our economy." Appendix B, p. 30.

Even though Congress used technical language in providing that the Act should apply only to a "contract . . . for the . . . furnishing of . . . supplies . . . in any amount exceeding $10,000 . . .", the lower court acted on the inference that in this "statutory reference" Congress "sought as inclusive a term as possible." Appendix B, p. 31 n. 4. The result of this explicit desire of the court of appeals to reach all significant dealing with the Government has been to extend the scope of the Act far beyond that intended by Congress.

Having presumed that the Act should apply to any significant Government procurement, regardless of the

form which that procurement took, the court of appeals disregarded at least three substantial legal barriers in order to reach the conclusion that the Purchase Notice was a contract as required by Congress.

First, the court expressly declined to "reach the question of whether an agreement between the Government and a private supplier must be legally enforcible for it to be regarded as a contract subject to the Walsh-Healey Act." Appendix B, p. 29 n. 1. Instead, the court determined only that the Purchase Notice did constitute a contract with reciprocal terms, including the Government's promise to distribute petitioner's price list and to buy directly from the petitioner (if any purchases were in fact made) and petitioner's promise to sell certain items at the same or lower prices quoted to others if those items were ordered prior to either termination of the Purchase Notice or a change in prices. But, even though those reciprocal promises may be deemed to be, for purposes of argument, an enforceable contract for some purposes, they can hardly be construed to constitute an enforceable contract *for the furnishing of supplies.* Indeed, whether those promises constituted a contract at all is irrelevant to the "central issue" of the case, which as all parties and the court below agreed (Appendix B, p. 28), is whether the Purchase Notice is a "contract . . . for the . . . furnishing of . . . supplies . . . in any amount exceeding $10,000 . . . ."

Second, the lower court entirely disregarded the basically contractual nature of the applicability of the Walsh-Healey Act. The contractual element which permeates this Court's construction of the Act, *e.g., Perkins v. Lukens Steel Co.*, 310 U.S. 113, 128-29 ("The Act does not represent an exercise by Congress of regulatory power over private business or employment."), may perhaps reflect the historic origin of the Act as a partial substitute for the discredited NRA, enacted at a time when previous

decisions cast doubt on general legislation to regulate wages and hours. But that principle of the Act is still viable when Congress has broad and unquestioned powers to legislate generally with regard to wages paid and hours worked by employees such as those of petitioner, whose work clearly affects interstate commerce, but Congress has not seen fit so to do.

Third, the court went beyond the record before it and, indeed, far beyond the suggestions of the Government, in an attempt to construct an economic analysis which would justify its disregard of the limitations imposed by the language of the Act.

The economic policy behind the Walsh-Healey Act is succinctly stated in the Report of the House Committee on the Judiciary, quoted in *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 128:

> "The object of the bill is to require persons having contracts with the Government to conform to certain labor conditions in the performance of the contracts and thus to eliminate the practice under which the Government is compelled to deal with sweat shops."

As the Government stated in the instant case, the purpose of the Act:

> "was to use the purchasing power of the Government to maintain wages and working conditions, and at the very least, to prevent the use of the Government procurement system to lower those wages and conditions. *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 128." Brief for Appellees in the court of appeals, p. 2.

But this is not a sweat shop case. The Government has conceded that petitioner paid total wages in excess of those which could be required under the minimum standards set by the Walsh-Healey Act. Petitioner's alleged

violation lies in its method of calculating overtime. The court of appeals apparently acted on the presumption that this case was one in which the traditional Government procurement system, *i.e.*, purchases from the lowest bidder, might act to reduce wage rates. The court stated:

> ". . . the Agreement itself specified the price of the items offered by Appellant; these price quotations, in turn, *presumably* controlled in large part the amount appellant could afford to pay those of its employees who worked on Government orders. As far as appellant was concerned, the Purchase Notice Agreement itself, not the orders thereunder, was the document which primarily determined its wage and employment policies." Appendix B, pp. 31-32. (Emphasis added.)

If these presumptions were correct, the congressional purpose might perhaps be served by holding that the Purchase Notice is subject to the Act. But "the realities of the business situation" (Appendix B, p. 32), are actually quite different from those presumed in the Opinion (and for which there is no support in the record).

The lower court's economic analysis was in error because the instant Purchase Notice has neither the same economic function nor the same economic effect as a contract for supplies to be purchased for and consumed by the Government. To the contrary, the Purchase Notice and the business relations it reflects are the result of the Government's being engaged in the retail grocery business through the operation of its commissaries.

The "realities" of this relationship were established in the testimony below. Petitioner's personnel deal with the various commissary managers in exactly the same manner as they deal with other grocery store managers (J.A. 95-99, 105). The prices specified in the Supply Bulletin issued pursuant to the Purchase Notice are not prices offered only to the Government. By the terms of the Purchase

Notice itself, these prices must be identical with or lower than the prices offered others (J.A. 18-19).

The purchases made by the Government do not involve any bidding (J.A. 108), since the prices are set in a manner which does not differ from that of any other retail food prices. The quantity of goods purchased under the Purchase Notice is not determined by any policies or preferences of the Government, but ultimately by the desires of the individuals who patronize the commissaries (J.A. 96-98). The money used by the Government to pay for petitioner's products actually represents cash paid to the commissaries by their individual customers (J.A. 229). Since the Government operates the commissaries on a self-sustaining basis (J.A. 220-221), any price increase in petitioner's products must be paid not by the Government but by the individual customers.

There is no evidence that the Purchase Notice was "the document which primarily determined [petitioner's] wage and employment policies," as "presumed" by the lower court, because the prices quoted by the Purchase Notice were merely equal to or slightly lower than the prices quoted to all other grocery store operators. To the contrary, it is much more correct to say that the wage and employment policies followed by petitioner, in part as a result of collective bargaining, "primarily" or "in large part" determined the price quotations which are distributed to all its customers, including the Government under the Purchase Notice. The problem posed by "the generally prevailing procurement system, whereby the Government was required to award contracts to the lowest bidder" and might thereby encourage "sub-standard wages and working conditions," Brief for Appellees in the court of appeals, p. 2, does not exist on the present record even as an abstract hypothesis, because the economic pressures involved are entirely different from those which the Act was intended to regulate.

The lower court has thus attempted to enlarge the scope of the Walsh-Healey Act far beyond its language and, indeed, the intent of Congress. It may be that such enlargement is or may become desirable (although such an expansion as to the instant employees would seem to be unnecessary since they are already paid in excess of the statutory minimums under the Act), but it is a clear transgression of the legislative function for such enlargement to be effected by judicial action.

2. The decision of the court of appeals conflicts with the rule announced by this Court that the Walsh-Healey Act applies only to those who are "fairly forewarned" of its applicability.

This Court held in *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 507, that the Act:

> "applies only to contractors who voluntarily enter into competition to obtain government business on terms of which they are fairly forewarned by inclusion in the contract."

The language of the court of appeals in the decision for which review is sought directly conflicts with this holding.

> "We recognize that it is somewhat harsh to apply the Walsh-Healey Act to a situation in which the contracting party was not given full notice of the statute's applicability at the time of contracting." Appendix B, p. 38.

Although the court qualifies the word "notice" with the adjective "full," thus implying that petitioner did receive

some notice, the record shows that petitioner and the rest of the baking industry, operating under identical Purchase Notice Agreements and substantially identical collective bargaining agreements, were led to believe, both explicitly and by the Government's conduct in failing to send them posters or other material required by regulations if the Act did apply, that a Purchase Notice Agreement was an "Offer" (capitalized in the original typewritten document prepared by the Government), and that each purchase order was the contract for the furnishing of supplies which would determine coverage, if any, under the Act. This, of course, was entirely consistent with the position of the Government stated some years earlier that the Act did not apply to continuing offers although individual purchase orders would be subject to the Act if they were individually in excess of $10,000 (J.A. 144).

The court of appeals attempted to suggest a few mitigating circumstances which might justify the "somewhat harsh" result,[3] but none of these is actually relevant.

First, the court stated that petitioner was put on notice by the text of the Purchase Notice. Actually, however, the Purchase Notice itself omits any reference to the Walsh-Healey Act. This reference relied upon by the court appears only in the General Provisions, GSA Standard Form 32, which was appended to the Purchase Notice Agreement, and which General Provisions refer, inter alia, to the *existence* of the Walsh-Healey Act, but

[3] Although the court of appeals noted that petitioner "acted in good faith," Appendix B, p. 38, it will be subject to liquidated damages of $3,457.87 merely for drivers in the Norfolk area during the period from 1957 to 1960 (J.A. 58). The total penalties due from all areas for all periods of time since 1957, of course, will be many times this amount. In order to maintain the status quo pending final determination of this case, petitioner was required to post bond in the amount of $100,000. (J.A. 4).

do not expressly or implicitly suggest the applicability of the Act to the instant Purchase Notice.[4]

Second, the court suggested that administrative decisions supporting the application of the Act, particularly *Funsten Co.*, 13 Wage & Hour Cas. 242 (per Hearing Examiner 1957), *aff'd* 13 Wage & Hour Cas. 819 (per Administrator 1958), were a matter of public record in 1957. This is obviously not true of the Administrator's decision dated July 24, 1958. Nor was the Hearing Examiner's decision dated March 7, 1957, generally available to the public prior to the execution of the Purchase Notice on May 9, 1957. That decision was published in the Commerce Clearing House Labor Law Reporter Report No. 462, dated June 6, 1957, almost a month after the Purchase Notice had been executed.

Moreover, it was not until October, 1959, over two years after the execution of the Purchase Notice, that the Government first advised petitioner (and others) in a "Notice to the Trade," that the Department of Labor had "recently advised . . . that it considers the Walsh-Healey Act to be applicable to the Purchase Notice Agreement itself" (J.A. 145-146).

If the requirement that the private party be "fairly forewarned by inclusion in the contract," *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 507, continues to have any vitality at all, this Court should review a decision upholding the applicability of the Act based on a record establishing that petitioner not only was not forewarned, but was affirmatively informed to the contrary.

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[4] In this connection it is noted that in its opinion the court of appeals refers to the individual orders as "subcontracts" and states that the use of this word comes from the Purchase Notice (Appendix B, p. 32 n. 6). A more careful reading of the Purchase Notice demonstrates that "subcontract" is used only once, and then only in the context of contracts between petitioner and third parties (Par. 22 a, J.A. 24).

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 20, 1966

APPENDIX A

Walsh-Healey Public Contracts Act, June 30, 1936, c. 881, §§ 1-12, 49 Stat. 2036, 41 U.S.C. §§ 35-45 (1964), as amended.

§ 35. Contracts for materials, etc., exceeding $10,000; representations and stipulations.

In any contract made and entered into by any executive department, independent establishment, or other agency or instrumentality of the United States, or by the District of Columbia, or by any corporation all the stock of which is beneficially owned by the United States (all the foregoing being hereinafter designated as agencies of the United States), for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000, there shall be included the following representations and stipulations:

(a) That the contractor is the manufacturer of or a regular dealer in the materials, supplies, articles, or equipment to be manufactured or used in the performance of the contract;

(b) That all persons employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract will be paid, without subsequent deduction or rebate on any account, not less than the minimum wages as determined by the Secretary of Labor to be the prevailing minimum wages for persons employed on similar work or in the particular or similar industries or groups of industries currently operating in the locality in which the materials, supplies, articles, or equipment are to be manufactured or furnished under said contract;

(c) That no person employed by the contractor in the manufacture or furnishing of the materials, supplies, articles, or equipment used in the performance of the contract

shall be permitted to work in excess of eight hours in any one day or in excess of forty hours in any one week: *Provided,* That the provisions of this subsection shall not apply to any employer who shall have entered into an agreement with his employees pursuant to the provisions of paragraphs (1) or (2) of subsection (b) of section 207 of Title 29;

(d) That no male person under sixteen years of age and no female person under eighteen years of age and no convict labor will be employed by the contractor in the manufacture or production or furnishing of any of the materials, supplies, articles, or equipment included in such contract; and

(e) That no part of such contract will be performed nor will any of the materials, supplies, articles, or equipment to be manufactured or furnished under said contract be manufactured or fabricated in any plants, factories, buildings, or surroundings or under working conditions which are unsanitary or hazardous or dangerous to the health and safety of employees engaged in the performance of said contract. Compliance with the safety, sanitary, and factory inspection laws of the State in which the work or part thereof is to be performed shall be prima-facie evidence of compliance with this subsection. June 30, 1936, c. 881, § 1, 49 Stat. 2036; May 13, 1942, c. 306, 56 Stat. 277.

§ 36. Same; liability for breach; cancellation; completion by Government agency; employee's wages.

Any breach or violation of any of the representations and stipulations in any contract for the purposes set forth in section 35 of this title shall render the party responsible therefor liable to the United States of America for liquidated damages, in addition to damages for any other breach of such contract, the sum of $10 per day for each male person under sixteen years of age or each female

person under eighteen years of age, or each convict laborer knowingly employed in the performance of such contract, and a sum equal to the amount of any deductions, rebates, refunds, or underpayment of wages due to any employee engaged in the performance of such contract; and, in addition, the agency of the United States entering into such contract shall have the right to cancel same and to make open-market purchases or enter into other contracts for the completion of the original contract, charging any additional cost to the original contractor. Any sums of money due to the United States of America by reason of any violation of any of the representations and stipulations of said contract set forth in section 35 of this title may be withheld from any amounts due on any such contracts or may be recovered in suits brought in the name of the United States of America by the Attorney General thereof. All sums withheld or recovered as deductions, rebates, refunds, or underpayments of wages shall be held in a special deposit account and shall be paid, on order of the Secretary of Labor, directly to the employees who have been paid less than minimum rates of pay as set forth in such contracts and on whose account such sums were withheld or recovered: *Provided,* That no claims by employees for such payments shall be entertained unless made within one year from the date of actual notice to the contractor of the withholding or recovery of such sums by the United States of America. June 30, 1936, c. 881, § 2, 49 Stat. 2037.

§ 37. Same; distribution of list of persons breaching contract; future contracts prohibited

The Comptroller General is authorized and directed to distribute a list to all agencies of the United States containing the names of persons or firms found by the Secretary of Labor to have breached any of the agreements or representations required by sections 35-45 of this title.

Unless the Secretary of Labor otherwise recommends no contracts shall be awarded to such persons or firms or to any firm, corporation, partnership, or association in which such persons or firms have a controlling interest until three years have elapsed from the date the Secretary of Labor determines such breach to have occurred. June 30, 1936, c. 881, § 3, 49 Stat. 2037.

§ 38. Same; administration; officers and employees; appointment; investigations; rules and regulations

The Secretary of Labor is authorized and directed to administer the provisions of sections 35-45 of this title and to utilize such Federal officers and employees and, with the consent of the State, such State and local officers and employees as he may find necessary to assist in the administration of said sections and to prescribe rules and regulations with respect thereto. The Secretary shall appoint an administrative officer, and such attorneys and experts, and other employees with regard to existing laws applicable to the employment and compensation of officers and employees of the United States, as he may from time to time find necessary for the administration of sections 35-45 of this title. The Secretary of Labor or his authorized representatives shall have power to make investigations and findings as provided in sections 35-45 of this title, and prosecute any inquiry necessary to his functions in any part of the United States. The Secretary of Labor shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of sections 35-45 of this title. June 30, 1936, c. 881, § 4, 49 Stat. 2038.

§ 39. Same; hearings by Secretary of Labor; witness fees; failure to obey order; punishment

Upon his own motion or on application of any person affected by any ruling of any agency of the United States

in relation to any proposal or contract involving any of the provisions of sections 35-45 of this title, and on complaint of a breach or violation of any representation or stipulation as provided in said sections, the Secretary of Labor, or an impartial representative designated by him, shall have the power to hold hearings and to issue orders requiring the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy, failure, or refusal of any person to obey such an order, any District Court of the United States or of any Territory or possession, or the United States District Court for the District of Columbia, within the jurisdiction of which the inquiry is carried on, or within the jurisdiction of which said person who is guilty of contumacy, failure, or refusal is found, or resides or transacts business, upon the application by the Secretary of Labor or representative designated by him, shall have jurisdiction to issue to such person an order requiring such person to appear before him or representative designated by him, to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof; and shall make findings of fact after notice and hearing, which findings shall be conclusive upon all agencies of the United States, and if supported by the preponderance of the evidence, shall be conclusive in any court of the United States; and the Secretary of Labor or authorized representative shall have the power, and is authorized, to make such decisions, based upon findings of fact, as are deemed to be necessary to enforce the provisions of sections 35-45 of this title. June 30, 1936, c. 881, § 5, 49 Stat. 2038; June 25, 1948, c. 646, § 32(b), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107.

§ 40. Same; exceptions; modification of contracts; variations; overtime; suspension of representations and stipulations

Upon a written finding by the head of the contracting agency or department that the inclusion in the proposal or contract of the representations or stipulations set forth in section 35 of this title will seriously impair the conduct of Government business, the Secretary of Labor shall make exceptions in specific cases or otherwise when justice or public interest will be served thereby. Upon the joint recommendation of the contracting agency and the contractor, the Secretary of Labor may modify the terms of an existing contract respecting minimum rates of pay and maximum hours of labor as he may find necessary and proper in the public interest or to prevent injustice and undue hardship. The Secretary of Labor may provide reasonable limitations and may make rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of sections 35-45 of this title respecting minimum rates of pay and maximum hours of labor or the extent of the application of said sections to contractors, as hereinbefore described. Whenever the Secretary of Labor shall permit an increase in the maximum hours of labor stipulated in the contract, he shall set a rate of pay for any overtime, which rate shall be not less than one and one-half times the basic hourly rate received by any employee affected: *Provided,* That whenever in his judgment such course is in the public interest, the President is authorized to suspend any or all of the representations and stipulations contained in section 35 of this title. June 30, 1936, c. 881, § 6, 49 Stat. 2038; June 28, 1940, c. 440, Title I, § 13, 54 Stat. 681.

§ 41. Same; "person" defined

Whenever used in sections 35-45 of this title, the word "person" includes one or more individuals, partnerships,

associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers. June 30, 1936, c. 881, § 7, 49 Stat. 2038.

§ 42. Same; effect of sections 35-45 on other laws

The provisions of sections 35-45 of this title shall not be construed to modify or amend Title III of the act entitled "An Act making appropriations for the Treasury and Post Office Departments for the fiscal year ending June 30, 1934, and for other purposes", approved May 3, 1933 (commonly known as the Buy American Act), nor shall the provisions of sections 35-45 of this title be construed to modify or amend sections 276a to 276a—5 of Title 40, nor the labor provisions of Title II of the National Industrial Recovery Act, approved June 16, 1933, as extended, or of section 7 of the Emergency Relief Appropriation Act, approved April 8, 1935; nor shall the provisions of sections 35-45 of this title be construed to modify or amend sections 744a-744n of Title 18. June 30, 1936, c. 881, § 8, 49 Stat. 2039.

§ 43. Same; sections 35-45 not applicable to certain contracts

Sections 35-45 of this title shall not apply to purchases of such materials, supplies, articles, or equipment as may usually be bought in the open market; nor shall they apply to perishables, including dairy, livestock and nursery products, or to agricultural or farm products processed for first sale by the original producers; nor to any contracts made by the Secretary of Agriculture for the purchase of agricultural commodities or the products thereof. Nothing in said sections shall be construed to apply to carriage of freight or personnel by vessel, airplane, bus, truck, express, or railway line where published tariff rates are in effect or to common carriers subject to

the Communications Act of 1934. June 30, 1936, c. 881, § 9, 49 Stat. 2039.

§ 43a. Applicability of Administrative Procedure Act; wage determination; administrative review; judicial review

(a) Notwithstanding any provision of section 1003 of Title 5, sections 1001-1011 of Title 5 shall be applicable in the administration of sections 35-39 and 41-43 of this title.

(b) All wage determinations under section 35(b) of this title shall be made on the record after opportunity for a hearing. Review of any such wage determination, or of the applicability of any such wage determination, may be had within ninety days after such determination is made in the manner provided in section 1009 of Title 5 by any person adversely affected or aggrieved thereby, who shall be deemed to include any manufacturer of, or regular dealer in, materials, supplies, articles or equipment purchased or to be purchased by the Government from any source, who is in any industry to which such wage determination is applicable.

(c) Notwithstanding the inclusion of any stipulations required by any provision of sections 35-45 of this title in any contract subject to said sections, any interested person shall have the right of judicial review of any legal question which might otherwise be raised, including, but not limited to, wage determinations and the interpretation of the terms "locality", "regular dealer", "manufacturer", and "open market". June 30, 1936, c. 881, § 10, as added June 30, 1952, c. 530, Title III, § 301, 66 Stat. 308.

§ 44. Same; separability of provisions

If any provision of sections 35-45 of this title, or the application thereof to any persons or circumstances, is held invalid, the remainder of said sections, and the ap-

plication of such provisions to other persons or circumstances, shall not be affected thereby. June 30, 1936, c. 881, § 11, formerly § 10, 49 Stat. 2039, renumbered June 30, 1952, c. 530, Title III, § 301, 66 Stat. 308.

§ 45. Same; effective date; exception as to representations with respect to minimum wages

Sections 35-45 of this title shall apply to all contracts entered into pursuant to invitations for bids issued on or after ninety days from June 30, 1936: *Provided, however,* That the provisions requiring the inclusion of representations with respect to minimum wages shall apply only to purchases or contracts relating to such industries as have been the subject matter of a determination by the Secretary of Labor. June 30, 1936, c. 881, § 12, formerly § 11, 49 Stat. 2039, renumbered June 30, 1952, c. 530, Title III, § 301, 66 Stat. 308.

APPENDIX B

1. Opinion of the Court of Appeals.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,489

UNITED BISCUIT COMPANY OF AMERICA, APPELLANT

v.

W. WILLARD WIRTZ, Secretary of Labor, et al., APPELLEES

Appeal from the United States District Court
for the District of Columbia

Decided November 19, 1965

Mr. Ralph Earle II, of the Bar of the Supreme Court of Pennsylvania, *pro hac vice*, by special leave of court, with whom *Mr. William J. Curtin* was on the brief, for appellant. *Mr. Richard C. Hotvedt* also entered an appearance for appellant.

Mr. Robert V. Zener, Attorney, Department of Justice, with whom *Assistant Attorney General Douglas, Messrs. David C. Acheson*, United States Attorney at the time the brief was filed, and *Sherman L. Cohn*, Attorney, Department of Justice, were on the brief, for appellees.

Mr. Howard Lichtenstein filed a brief on behalf of the National Biscuit Company, as *amicus curiae*, urging reversal.

Before BAZELON, Chief Judge, and WASHINGTON and WRIGHT, Circuit Judges.

WASHINGTON, *Circuit Judge*: This action challenges the validity of a determination by the Secretary of Labor that appellant United Biscuit Company violated the overtime provisions of the Walsh-Healey Public Contracts Act, 49 STAT. 2036 (1936), as amended, 41 U.S.C. §§ 35-45 (1958).

The facts in this case are not in dispute. In 1957, appellant and the Government, represented by the Military Subsistence Supply Agency (MSSA), entered into a written agreement, known as a Purchase Notice Agreement. Under the Agreement, appellant provided the MSSA with a list of some of its products and offered to sell the specified items to the Government at the prices listed, or at any lower price that appellant might offer to any other purchaser. The MSSA, in return, agreed to distribute these price lists to all commissaries and other military installations and promised that purchases made with appropriated funds by military installations in the continental United States for the purpose of resale would be made directly from appellant under the Agreement, not through middlemen. The Agreement was terminable after due notice by either party to the contract. Subsequently, the Government placed and the appellant filled a number of orders under the Purchase Notice Agreement. Although the total amount of purchases was quite large, no single order exceeded $10,000 in amount. Appellant was not given explicit notice by the MSSA that the Walsh-Healey Public Contracts Act was considered applicable to the Purchase Notice Agreement at the time it entered into the arrangement. However, on October 30, 1959, appellant received a letter from MSSA advising that the

Act was thought to apply to the Agreement. On January 6, 1960, the Department of Labor initiated a proceeding against appellant, charging violations of the Walsh-Healey Act. The Secretary of Labor found that the Purchase Notice Agreement was subject to the Walsh-Healey Act and that appellant had violated the Act by not paying certain of its employees time and one-half for hours worked in excess of eight on any day or forty in any week. Appellant brought suit in the District Court and that court sustained the Secretary's determination. This appeal followed.

The central issue in this case is whether the Purchase Notice Agreement is a "contract made and entered into by any executive department . . . for the manufacture or furnishing of materials, supplies, articles, and equipment in any amount exceeding $10,000 . . . ." under the Walsh-Healey Act, 41 U.S.C. § 35. The Walsh-Healey Act was passed in 1936 in an effort "to use the leverage of the Government's immense purchasing power to raise labor standards," *Endicott Johnson Corp.* v. *Perkins,* 317 U.S. 501, 507 (1943), and "to obviate the possibility that any part of our tremendous national expenditures would go to forces tending to depress wages and purchasing power and offending fair social standards of employment." *Perkins* v. *Lukens Steel Co.,* 310 U.S. 113, 128 (1940). See also *George v. Mitchell,* 108 U.S.App.D.C. 324, 282 F.2d 486 (1960). The basic design of the Act is quite simple: to force suppliers and manufacturers doing business with the Government to observe minimum labor and wage standards by the insertion in Government contracts of the representations and stipulations contained in Section 35. Violation of these representations and stipulations renders the contracting party liable for damages and, possibly, for black-listing from Government contracts for a three-year period. 41 U.S.C. §§ 36 and 37.

Appellant argues that the Purchase Notice Agreement is not a contract, but merely a continuing offer. In the

alternative, appellant contends that even if the Agreement is a valid contract, it is not a "contract . . . for the manufacture or furnishing of . . . supplies" within the meaning of the Act. Because under the terms of the Purchase Notice Agreement the Government is not obligated to order any products and appellant is not obligated to furnish any, appellant argues that the plain meaning of the words of the statute compels the conclusion that the Act does not apply to the Purchase Notice Agreement. We are not so persuaded.

The Purchase Notice Agreement, which is the subject of this suit, is an enforcible contract at common law; it is in the nature of a bilateral option contract. Each party has made certain promises, and these promises constitute consideration adequate to support the promises of the other party. Mutuality of obligation is not lacking. 1A CORBIN, CONTRACTS §§ 152, 157 (1963).[1] The fact that the parties to the Agreement denominated the writing as a "continuing offer" is not germane to the question presented by this case. Nor, for the same reason, is the fact that the Agreement is in the nature of an option contract rather than of a contract for the sale of specific goods dispositive. We are not faced with a problem of classifying the Agreement under the familiar categories of the common law, nor of ascertaining the parties' intent in establishing their relationship. The case presents a question of statutory interpretation, and the answer must be found in the language and policy of the Act: what did Congress mean by the phrase "contract . . . for the . . . furnishing of . . . supplies?"

The Walsh-Healey Act was designed by Congress to create a broad remedial scheme applicable to all significant Government procurement of supplies, equipment and

[1] Thus, we need not reach the question of whether an agreement between the Government and a private supplier must be legally enforcible for it to be regarded as a contract subject to the Walsh-Healey Act.

machinery.[2] When Congress desired to exempt certain kinds of procurements from the Act, it did so explicitly. See 41 U.S.C. § 43. We must thus start with the presumption that Congress intended the Act to cover all regular and institutionalized methods of purchase used by the Government resulting in large scale acquisitions of material and supplies from the private sector of our economy. Appellant is one of the three largest manufacturers of cookies and biscuits in the United States and its sales represent a significant percentage of the total biscuit and cookie market in this country. The Agreement covered all military installations in the United States, and purchases for military installations abroad were also permitted under its terms. The Supply Bulletin distributed pursuant to the Agreement listed some 175 items which might be purchased from 12 different divisions of appellant. In a little over two years appellant sold the Government $253,472.34 worth of goods from its Norfolk, Virginia, branch alone. Given these facts, most of which were known at the time the Agreement was signed, it is apparent that both parties to the contract must have contemplated that large scale Government procurements would be made under the Agreement.[3] In addition, it appears obvious that Congress must have desired the Walsh-Healey Act to reach requirement contracts. Yet, such contracts differ from the Agreement in this case only in that under a requirements contract the Government would be obligated to make purchases.

[2] See, *e.g.*, 80 CONG. REC. 10004-07 (1936) (remarks of Representatives Duffy, Michener, and Wadsworth).

[3] We are at least certain that appellant hoped to sell the Government large quantities of its products and worked hard to achieve that end. Moreover, given the variety and widespread popularity of appellant's goods, the Government could have anticipated that its commissaries, which service the needs of military households, would purchase substantial amounts of appellant's cookies and biscuits.

Where, as in this case, the context of a contract leaves no doubt that the Government contemplated large purchases and where such purchases actually occurred, it would be anomalous, in light of the policy of the Act, to differentiate between the two kinds of contracts. In both cases large procurements would be made during the course of an on-going commercial relationship, in both the type of goods to be purchased and their price would be specified, and in both the effect, if any, of the contract upon the wages and working conditions of the seller's employees and upon labor conditions in general would be identical. In sum, to exclude from the scope of the Act contracts, such as the Purchase Notice Agreement, which created a continuing commercial relationship of a sizeable, but indefinite, amount would defeat congressional policy.[4] We thus conclude that the Purchase Notice Agreement is a contract for the furnishing of supplies within the meaning of Section 35.

The question then becomes whether the Purchase Notice Agreement is a "contract . . . in any amount exceeding $10,000." 41 U.S.C. § 35. Appellant relies on the fact that no single order under the Agreement totalled over $10,000. This argument, however, ignores the basic purpose of the Act—to control all large scale purchases by the Government which might adversely affect labor conditions. It seems clear that at the time the Agreement was signed, the parties must have anticipated that the total amount of the suplies to be furnished would be in excess of $10,000, and subsequent events more than justified their expectations. Moreover, the Agreement itself specified the price of the items offered by appel-

[4] Congress did not limit the Act to contracts for the sale of a particular amount of goods at a particular time or place. If any inference is to be drawn from the statutory reference to contracts for the furnishing of supplies, it is that Congress sought as inclusive a term as possible.

lant;[5] these price quotations, in turn, presumably controlled in large part the amount appellant could afford to pay those of its employees who worked on Government orders. As far as appellant was concerned, the Purchase Notice Agreement itself, not the orders thereunder, was the document which primarily determined its wage and employment policies. Treating all of the orders as units or subcontracts[6] under the Agreement, therefore, would conform to the realities of the business situation and, by looking to the document which affected appellant's labor practices, would effectuate the purposes of the Act. Nor would aggregating the individual orders frustrate the rationale behind the $10,000 minimum of the Act.[7] Thus, using the policies of the Walsh-Healey

[5] In fact, no list of items and prices was attached to the Purchase Notice Agreement. A Supply Bulletin was issued pursuant to the Agreement, however, and it contained the price list that should have been appended to the Agreement. This list has been treated as the one provided for by the Agreement throughout this litigation.

[6] The Purchase Notice Agreement, and Form 32, which was incorporated therein, occasionally referred to the contemplated orders as "subcontracts." This usage was not consistent, however, and it is impossible to say whether it was the result of careless drafting or of a conscious effort by the parties to the contract to describe the relationship between the Agreement and the individual orders for specific goods.

[7] As we recognized in George v. Mitchell, *supra* at 331, 282 F.2d at 493, "the $10,000 minimum was designed both to enable small manufacturers to obtain Government contracts and to avoid administrative burdens." A further explanation, suggested by the congressional debate over the Walsh-Healey Act, was that small and casual contracts would not have a significant depressant effect upon wages and conditions of employment within a given industry or the country as a whole. See 79 CONG. REC. 12779 (1935) (remarks by Senator Hastings). As we have pointed out, the Purchase Notice Agreement in this case was by no means a small contract whether it is viewed retrospectively or from the vantage point of the parties when it was

Act as our guide, we conclude that the Purchase Notice Agreement between appellant and the Military Subsistence Supply Agency falls within the coverage of the Act.[8]

Appellant further argued in the District Court that the Purchase Notice Agreement came within the open market exception of the Walsh-Healey Act, 41 U.S.C. § 43, which states that the Act does not "apply to purchases of such . . . supplies . . . as may usually be bought in the open

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negotiated. Nor would aggregating the individual orders place an undue administrative burden on the Government or appellant. From the Government's point of view, large scale procurement was contemplated and occurred; this was not a case of small, isolated or haphazard dealings with a contractor. See, *e.g.*, Hearing on S.3055 Before the Senate Committee on Education and Labor, 74th Cong., 1st Sess. 18-19 (1935); Hearing Before a Subcommittee of the House Committee on the Judiciary, 74th Cong., 2d Sess., Ser. 12, Pt. 2, at 165-70 (1936). From appellant's perspective, the situation was not different from that which would be faced under a requirements contract or under a large order to be delivered in small quantities to various installations over a long period of time. Finally, appellant is in no position to claim that it is a small business deserving of lower standards in order to obtain Government contracts.

[8] We also note that the Department of Labor's interpretation of the Walsh-Healey Act is in accord with the position we have taken in this case. In the Rulings and Interpretations now in effect, 2 CCH Labor Law Rep. (Wages-Hours) ¶ 26,300.003, and in a line of decisions in the Public Contracts Division, it has been held that contracts under which the Government has the option to purchase more than $10,000 worth of supplies are covered by the Act. See, *e.g.*, Anderson and Cristofani, 9 Wage & Hour Cas. 86 (Per Administrator, 1949); Euler Lime Co., 10 Wage & Hour Cas. 176 (Per Administrator, 1951). Indeed, the Public Contracts Division has held that the Walsh-Healey Act is applicable to a Purchase Notice Agreement apparently similar to that of the instant case. Funsten Co., 13 Wage & Hour Cas. 242 (Per Hearing Examiner, 1957), *aff'd*, 13 Wage & Hour Cas. 819 (Per Administrator, 1958).

market."[9] The fact that the Purchase Notice Agreement was entered into pursuant to the Armed Services Procurement Act of 1947, 62 STAT. 21, as amended, 10 U.S.C. §§ 2301-2314 (1958), takes it out of the ambit of the exception.[10] Although that Act authorizes certain purchases to be made by negotiation, the open-market exception of the Walsh-Healey Act is suspended insofar as such purchases are concerned. 10 U.S.C. §§ 2304(a)(8) and 2304(f).

Appellant, however, urges that the purchases made under the Purchase Notice Agreement were not within the Armed Services Procurement Act, since that Act applies only to purchases made with appropriated funds. 10 U.S.C. § 2303(a).[11] Military Commissary purchases are

[9] Appellant did not rely on this defense during the course of the administrative proceeding. It was first raised by appellant's amendment to its complaint in the District Court filed on February 14, 1961.

[10] The only statute which has been identified as possibly authorizing the Purchase Notice Agreement is the Armed Services Procurement Act of 1947. The Military Subsistence Supply Agency relied upon this statute for authority to enter into the Agreement. Moreover, the legislative history of the Procurement Act indicates that Congress intended it to be as comprehensive as possible—to apply to all procurements of supplies and equipment by every branch of the armed forces. Finally, it is clear that Congress expressly designed one subsection of the Act, Section 2304(a)(8), to permit commissary purchases of brand-name items. H.R.REP.No. 109, 80th Cong., 1st Sess. 8 (1947); S.REP.No. 571, 80th Cong., 1st Sess. 7 (1947). Thus, we must begin our inquiry with the assumption that, unless shown otherwise, the Act governed and authorized the purchases in question.

[11] We see no impropriety in the District Court's remanding the case to the Secretary of Labor for further findings on the question of whether the funds were appropriated. Since appellant did not argue the applicability of the open-market exception, the Government had no obligation to prove its inapplicability in the original hearing. Indeed, there is some question about the propriety of appellant's raising in the District Court a legal theory not presented to the agency.

made with moneys drawn on the Treasury from what are known as "stock funds." Creation of these stock funds was first authorized by Section 405 of the National Security Act Amendments of 1949.[12] The stock funds were established in order to provide more efficient controls over the cost and size of virtually all military expenditures. As inventory or supplies are used, a charge is made against the appropriate fund. The fund is then credited with appropriations or other moneys in order to replace the supplies. In the case of commissaries all purchases of goods by the commissary, including those made under the Purchase Notice Agreement in this case, are paid for out of a stock fund. The money received for the goods on resale to the military consumer is then credited to the stock fund.

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[12] "SEC. 405. (a) In order more effectively to control and account for the cost of programs and work . . . the Secretary of Defense is authorized to require the establishment of working-capital funds . . . .

• • •

"(c) Such funds shall be—

"(1) charged, when appropriate, with the cost of stores, supplies, materials, and equipment procured . . . .

"(2) reimbursed from available appropriations or otherwise credited for the cost of stores, supplies, materials, or equipment furnished . . . .

"(d) The secretary of Defense is authorized to provide working capital . . . by capitalizing inventories on hand and . . . by transfer . . . from unexpended balances of any appropriations of the military departments . . . . To the extent that such methods do not . . . provide adequate amounts of working capital, there is hereby authorized to be appropriated, out of any moneys in the Treasury not appropriated for other purposes, such sums as may be necessary to provide adequate working capital." 63 STAT. 578, 587-88 (1949).

The current version of this statute may be found at 10 U.S.C. § 2208 (SUPP. V, 1959-63).

Appellant seizes on this method of financing and argues that the money paid it for its goods came not from appropriated funds, but from the consumer's pocket. Appellant analogizes the stock fund to a regular bank account and argues that the court should "trace" the money to the consumers who paid the commissaries for the goods. We find no merit in appellant's contentions.

It appears that prior to passage of Section 405, commissary purchases were made from appropriated funds,[13] and the legislative history of that section fails to disclose a congressional purpose to alter the source of funds for such purchases. Rather, Congress apparently assumed that commissary purchases were still to be made from appropriated funds. The provision for a revolving fund, replenished by the proceeds from commissary sales, was apparently considered an administrative convenience. It eliminated the need for a new appropriation each fiscal year by creating what was, in effect, an on-going appropriation. See S.Rep.No. 366, 81st Cong., 1st Sess. 11-20 (1949); H.Rep.No. 1064, 81st Cong., 1st Sess. 6-11 (1949); H.Rep.No. 790, 82nd Cong., 1st Sess. 116 (1951). Long standing administrative rulings and practice support this interpretation of Section 405. The Comptroller General, in the past, has ruled that the establishment of a revolving fund, replenished by moneys from the public, constitutes an on-going appropriation which does not have to be renewed each year. 1 Comp.Gen.Decs. 704. (1922). And the armed services have conducted their entire purchasing program for commissaries under the belief that

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[13] For example, when Congress passed the Armed Services Procurement Act, it specifically authorized commissary purchases of brand-name items without competitive bidding. 10 U.S.C. § 2304(a)(8). Congress, in 1947, thus understood that commissary purchases were made from appropriated funds within the meaning of 10 U.S.C. § 2303(a). See S.Rep.No. 571, 80th Cong., 1st Sess. 7 (1947); H.Rep. No. 109, 80th Cong., 1st Sess. 8, 18 (1947).

moneys paid out of the stock funds were appropriated. Finally, the Supreme Court has recently stated, during the course of an opinion, that all commissary purchases are made from appropriated funds within the meaning of Section 2303(a). *Paul* v. *United States*, 371 U.S. 245, 261-63 (1963). Although these statements might be viewed as dicta, they were essential to the logic of the majority opinion, and they were not rejected by the vigorous and careful dissent in the case. Even if these statements are not binding, they are quite persuasive. We thus conclude that the moneys paid by the Treasury to appellant out of the various military stock funds constituted "appropriated funds" within the meaning of Section 2303(a).[14]

[14] Further support for our conclusion comes from the well worn, but still valid, maxim that Government actions are to be presumed lawful. The United States Constitution, Article I, Section 9, Clause 7, provides that "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." The proceeds from all sales made by the commissaries in question were paid into the United States Treasury and appellant was paid by Treasury check, charged to the appropriate military stock fund. To deny that the commissary purchases were made with appropriated moneys would be tantamount to declaring that the payments to appellant from the Treasury, and an unknown portion of the entire military procurement program, were unconstitutional. See, *e.g.*, Reeside v. Walker, 52 U.S. (11 How.) 272, 291 (1850); Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937). Indeed, the issue of whether Government purchases are made within the bounds of this constitutional requirement may approach that category of legal problems known as "political questions." A contrary decision in this case would apparently trench upon the prerogatives of the executive and legislative branches and would raise serious problems of "separation of power." Moreover, it would seem impossible in this connection for a court to establish workable criteria by which to distinguish those acts of Congress which created valid appropriations from those which did not.

We recognize that it is somewhat harsh to apply the Walsh-Healey Act to a situation in which the contracting party was not given full notice of the statute's applicability at the time of contracting. If the Act is found applicable, appellant will be subject to liquidated damages of about $3,500, and it may be "black-listed" from receiving Government contracts for three years. 41 U.S.C. § 37. However, the record indicates that since appellant acted in good faith, it would not be black-listed upon prompt payment of the liquidated damages.

Probably as important from appellant's point of view is the disruption that would be caused to its existing labor policies by an adverse decision. The Purchase Notice Agreement does, however, incorporate by reference the representations and stipulations that are required by the Walsh-Healey Act, if it is applicable to the contract; appellant was thus put on notice. In addition, an unbroken line of administrative decisions by the Public Contracts Division of the Labor Department, strongly suggesting that the Act was applicable to the Purchase Notice Agreement, was a matter of public record in 1957. See cases cited in footnote 8, *supra*. More significantly, the Portal-to-Portal Act of 1947, 61 STAT. 89 (1947), 29 U.S.C. § 259 (1958), provides a Government contractor with a certain method of determining the applicability of the Act to its transactions with the Government. Appellant has not availed itself of this procedure;[15] hence, his reliance on the Defense Department's

[15] Apparently, the Administrator of the Division of Public Contracts sent a letter to National Biscuit Company in 1943 stating that a Purchase Notice Agreement would not be considered a contract for the furnishing of supplies within the meaning of the Walsh-Healey Act. Appellant, however, never claimed reliance on this letter, nor was this letter introduced as an exhibit in the instant case. Thus we will not consider what effect it might have in a similar case brought by different parties.

or on his own interpretation of the Walsh-Healey Act is no defense to this action. Cf. *United States* v. *Stocks Lincoln-Mercury, Inc.*, 307 F.2d 266 (10th Cir. 1962). Appellant's other contentions have been given due consideration, but we find no basis for overturning the District Court's decision.

Affirmed.

2. Findings of Fact and Conclusions of Law of the District Court.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 278-61

United Biscuit Company of America,
Plaintiff,

v.

W. Willard Wirtz, Secretary of Labor, et al.,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW
Filed Dec. 6, 1963

This cause came on for trial before the Court and without a jury, and the Court having duly considered all the evidence, the pleadings filed in this cause, and after remand of this cause for additional administrative proceedings, and after consideration of that administrative record, now makes the following findings as provided by Rule 52(a), Federal Rules of Civil Procedure:

1. This action was brought for the two-fold purpose of (a) determining whether or not the Secretary of Labor, acting through the Administrator of the Public Contracts Division of the United States Department of Labor, had correctly concluded that the provisions of the Walsh-

Healey Public Contracts Act, 41 U.S.C. 35-45, hereinafter referred to as the Public Contracts Act, were applicable to an agreement entered into between the plaintiff and the United States Government, and (b) enjoining the defendants from taking any action under Section 3 of the Public Contracts Act which would result in the placing of plaintiff's name on the Government's list of debarred bidders.

2. Plaintiff, a Delaware corporation, is engaged in the manufacture and distribution of baked goods and operates numerous plants throughout the United States, including a plant at Norfolk, Virginia, known as the Streitmann Biscuit Company.

3. The defendants herein are the Secretary of Labor who is charged, among other things, with the enforcement of the Public Contracts Act, and the Comptroller General of the United States who is directed by Section 3 of the Public Contracts Act to distribute to all agencies of the United States a list containing the names of persons or firms found by the Secretary of Labor to have breached any of the agreements or representations required by the Public Contracts Act.

4. On May 9, 1957, plaintiff submitted an offer to the Government to enter into a purchase notice agreement with the United States of America, which offer was duly accepted by the United States of America on June 18, 1957, and designated Purchase Notice Agreement Contract No. DA-49-104-QM-P-223.

5. The aforesaid purchase notice agreement contract was negotiated under the Armed Services Procurement Act of 1947 (codified to 10 U.S.C. 2304).

6. Pursuant to the aforesaid purchase notice agreement contract, the Government printed and distributed supply

bulletins which informed its purchasing agents of their authority to purchase products from the plaintiff.

7. During the period from on or about December 13, 1957 until or about March 18, 1960, plaintiff's Streitmann Biscuit Company division, pursuant to the aforesaid purchase notice agreement contract, supplied baked goods to Government installations in the Norfolk, Virginia area, namely commissaries, in an amount exceeding $253,000.

8. On January 6, 1960, the Under Secretary of Labor issued a complaint under Section 5 of the Public Contracts Act in which plaintiff was charged with failure to pay overtime compensation to certain of its Streitmann Biscuit Company division's employees engaged in the performance of the aforesaid purchase notice agreement contract, as required by the Public Contracts Act and by the Regulations promulgated thereunder by the Secretary of Labor (41 CRF [sic] 50-201.103).

9. Administrative hearings, designated PC-770, were had on said complaint before a duly qualified hearing examiner with opportunity to submit evidence and argument and with rights of appeal as prescribed in the Rules of Practice adopted by the Secretary of Labor under Section 5 of the Public Contracts Act and found in 41 CRF [sic] 50-203.

10. During the administrative proceedings plaintiff admitted that its Streitmann Biscuit Company division had permitted certain employees to work in the performance of the aforesaid purchase notice agreement in excess of 8 hours a day and 40 hours a week without paying such persons for such excess hours at the rate of time and one-half their basic hourly rates as required by Sections 1 and 6 of the Act and the applicable Regulations.

11. On October 28, 1960, the Secretary of Labor, acting through the Administrator of the Public Contracts Divi-

sion of the Department of Labor, found that the Purchase notice agreement was subject to the Walsh-Healey Act and that in furnishing supplies under this Agreement the plaintiff had breached the overtime compensation agreements required by said Act. Plaintiff was ordered to pay liquidated damages in the sum of $3,657.87 as required unpaid overtime. The Secretary recommended that upon payment of the liquidated damages, the plaintiff be relieved from the ineligible list sanction of the Walsh-Healey Act. This suit was then filed by the plaintiff, plaintiff having elected not to pay the liquidated damages.

12. This matter came before this Court for trial and after the introduction of evidence, was remanded on March 16, 1962 to the Secretary of Labor for further proceedings with regard to whether or not the goods purchased under the aforementioned Agreement were purchased with appropriated funds.

13. On April 25, 1963, the Secretary of Labor, acting through the Administrator of the Public Contracts Division of the Department of Labor found that payments for the purchases in question under the Agreement were made from appropriated funds. The Court notes that at the administrative proceedings, the parties stipulated that all of the purchases there involved were commissary purchases, and, further, it was agreed that if such commissary purchases were made with appropriated funds, plaintiff would not be entitled to the "open market" exemption contained in § 9 of the Walsh-Healey Public Contracts Act, 41 U.S.C. § 43.

CONCLUSIONS OF LAW

1. The Purchase Notice Agreement Contract No. DA-49-104-QN-P-223 is a contract for the furnishing of supplies in excess of $10,000, and is subject to the provisions of the Walsh-Healey Public Contracts Act.

2. Plaintiff has failed to sustain its burden of proving that the purchases here involved come within the open market exemption contained in Section 9 of the Walsh-Healey Public Contracts Act, 41 U.S.C. § 43.

3. The purchases made under the Purchase Notice Agreement Contract here involved were commissary purchases from appropriated funds.

4. Plaintiff is not entitled to the open market exemption contained in Section 9 of the Walsh-Healey Public Contracts Act, 41 U.S.C. § 43.

5. The administrative findings of the Secretary of Labor in this action are supported by a preponderance of the evidence.

6. Plaintiff is subject to the ineligible list sanctions of Section 3 of the Walsh-Healey Public Contracts Act.

7. Plaintiff has failed to sustain his burden of proof in this action.

8. Defendants are entitled to judgment.

JOSEPH C. MCGARRAGHY
United States District Judge

December 6, 1963